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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1965

No. 695

JOE ROBERT COLLIER, PETITIONER

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 14, 1965
CERTIORARI GRANTED OCTOBER 25, 1965

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Supreme Court of the United States

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JOE ROBERT COLLIER, PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISRICT OF KENTUCKY

DOCKET ENTRIES

D. C. Form No. 100A

CRIMINAL DOCKET 26439

THE UNITED STATES

vs.

JOE ROBERT COLLIER

18 USC 2421
WHITE SLAVE TRAFFIC ACT

1 Count

Attorneys

For U. S.:

WILLIAM E. SCENT

For Defendant:

MR. GUY C. SHEARER
903 Republic Building
Louisville, Kentucky

Abstract of costs	Cash Received and Disbursed			
	Date	Name	Rec.	Dis.
Fine,	4-12-65	Guy C. Shearer	5.00	
Clerk,	4-12-65	Treas. U. S.		5.00
Marshal,	Apr. 20	Guy C. Shearer, Atty—(Notice of Appeal)	5.00	
Attorney,	Apr. 20	Treas.—U.S.		5.00
Commissioner's Court,				
Witnesses,				

Date	Proceedings
1965	
2-15	Indictment returned and filed.
MAR 1965	J. S. 2 mailed.
3-16	Arraignment order signed by Judge Brooks 3/15/65. Plea of not guilty entered. Set for trial on March 24, 1965, at 9:30 a.m. Bond continued.
3/17	Praecipe for spoes to Gerald E. Pitts, Richard F. Hufford, Archie Stokes, Dennis L. DeBrandt, Paul Guest, Tom Zepada, Booker Blakey, Will Laird and Mrs. John Novak filed by U. S. Attorney. Spoes issued and delivered to U. S. Marshal.
3/18	Spoes returned executed: Laird, Pitts, Hufford, Stokes, DeBrandt, Guest, Zepada, and Blakey.
3/22	Praecipe for spoe to Candie Norwood filed by U. S. Atty. Spoe issued and delivered to U. S. Marshal.
3-24	Jury Verdict: "We, the Jury, find the defendant, Joe Robert Collier, Guilty as to the one count of the indictment. March 24, 1965 /s/ Arnold F. Pohl, Foreman".
[fol. 2]	
3/25	TRIAL ORDER dated 3/24/65 (Judge Brooks). Jury verdict GUILTY as charged in single count. Copies to Attorneys Martin and Collier.
3/25	JUDGMENT & COMMITMENT dated 3/24/65 (Judge Brooks). 1 Year & 1 Day imprisonment; serve 5 Months balance suspended; Probation 3 years w/super 18:3651
APRIL 65	J. S. 3 mailed
3/29	Spoe to Mrs. John Novak returned executed.
4-2	Motion for substitution of counsel filed by Joe R. Collier. Order tendered.
4-2	Motion for a New Trial and Motion for Bond filed by Guy C. Shearer.
4-5	Order signed by Judge Brooks 4-5-65, sustaining motion for substitution of counsel and denying motion for new trial. Copies to Joe R. Collier, Boyce F. Martin, Jr., and Guy C. Shearer.
4-9	Defendant, Joe R. Collier's Motion in Arrest of Judgment—filed by Guy Shearer, atty
4-12	Notice of appeal by defendant, Joe R. Collier, to U. S. Court of Appeal for 6th Circuit—filed by Guy C. Shearer, attorney. Copy mailed 4/12/65 to U. S. Attorney

Date	Proceedings
1965.	
4-12	Defendant, Joe R. Collier's "Application For Bond Pending Appeal" requesting an order of Court directing that any further service of time on judgment heretofore rendered against him be withheld pending final adjudication of appeal and that Court grant him a reasonable bond pending appeal—filed by Guy C. Shearer, attorney
4-12	Criminal Form No. 27 (Statement of Docket Entries), together with copy of Judgment and Commitment and copy of Notice of Appeal, mailed to Clerk U. S. Court of Appeals 6th Circuit.
4/15	Order signed by Judge Brooks 4/15/65 dismissing motion to arrest judgment and denying motion for bail pending appeal. Copies to U. S. Attorney and Guy C. Shearer.
4/20	"Notice of Appeal From The Court's Order Of April 15, 1965"—filed by Guy C. Shearer as attorney for defendant. Copy mailed to U. S. Attorney same date (4/20/65) Copy mailed to Clerk U. S. Court of Appeals 6th Circuit, together with copy of order of Court dated Apr. 15, 1965, on same date (4/20/65)
5-5	Motion to suspend remainder of 5 month sentence imposed, or for Court to give him credit on said sentence for time he has been confined in Jefferson County Jail filed by Guy C. Shearer.
5-6	Subpoena as to Candie Norwood returned executed.
5/11	Order signed by Judge Brooks 5/11/65—motion to modify sentence denied; motion to give credit for time he has been in custody awaiting trial was considered when the sentence was imposed and, therefore, that motion is also denied. Copies to U. S. Atty. and Guy C. Shearer.
[fol. 3]	
5-15	Motion for extension of time to and including June 14th, 1965 for filing and docketing record on appeal in Court of Appeals for 6th Circuit filed by Guy C. Shearer. Order tendered.
5-17	Order signed by Judge Brooks 5/17/65 extending to and including June 14, 1965, time for filing record on appeal and docketing appeal in U. S. Court of Appeals for 6th Circuit. Copies mailed 5/17/65 to Guy C. Shearer, Boyce Martin, U. S. Attorney, and to Clerk U. S. Court of Appeals 6th Circuit.

[fol. 4]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. 26439

(18 U. S. C., § 2421)

UNITED STATES OF AMERICA

vs.

JOE ROBERT COLLIER

INDICTMENT—Filed February 15, 1965

The Grand Jury charges:

FIRST COUNT

On or about the 15th day of December, 1964, in the Western District of Kentucky, JOE ROBERT COLLIER did knowingly transport and cause to be transported a certain woman, to-wit, Wanda York, in interstate commerce; that is, in commerce from Colorado Springs, State of Colorado, to Louisville, State of Kentucky, for the purpose of debauchery, prostitution and other immoral purposes.

In violation of Section 2421, Title 18, United States Code.

F nm 5000 or I nm 5 y or b

A True Bill.

/s/ [Illegible]
Foreman

/s/ William E. Scent
United States Attorney

[fol. 4a] [File Endorsement Omitted]

[fol. 5]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

[Title Omitted]

ORDER SETTING CASE FOR TRIAL—March 16, 1965

This case was called in open court on March 15, 1965 and there appeared John E. Stout, Assistant United States Attorney, and the defendant, Joe Robert Collier, in person and by counsel, William Goldberg.

Defendant acknowledged his identity, was furnished a copy of the indictment and advised of the nature of the charges contained therein. By counsel, formality of arraignment was waived and a plea of NOT GUILTY was entered as to Count 1.

IT IS ORDERED that trial will be held on March 24, 1965, at 9:30 A.M. Defendant shall stand on the covenant of the bond executed for his appearance in this court.

/s/ Henry L. Brooks
United States District Judge

March 15, 1965

[File Endorsement Omitted]

[fol. 6]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

[Title Omitted]

TRIAL ORDER—March 24, 1965

This case was called in open court on March 24, 1965 and there appeared Mr. John E. Stout, Assistant United States Attorney, and the defendant, Joe Robert Collier, in person and by counsel, Mr. William Goldberg.

Both sides announced ready and the following jury:

Francis Longacre, Sr.	J. Benjamin Horton
Matthew B. Quinn	Mrs. John Wirth
Martin Dunbar, Jr.	Arnold Pohl
William Hollis Bell	Stanley Dadesman
William A. Cain	Dallas Tinsley
Mrs. C. J. Armstrong	W. R. Moorman, Jr.

was impanelled and sworn.

Mr. Stout read the indictment and stated the case for the United States. Counsel for the defendant waived opening statement.

Evidence for the United States was introduced and concluded. Evidence was presented by the defendant. Mr. Goldberg argued the case for the defendant.

At the conclusion of all evidence and arguments, the Court instructed the jury and it retired to consider the case.

Later, the jury returned into open court and in the presence of all parties, read the following verdict:

"We, the Jury, find the defendant, Joe Robert Collier, Guilty as to the one count of the indictment.

March 24, 1965

/s/ ARNOLD F. POHL, Foreman"

March 24, 1965

/s/ Henry L. Brooks
United States District Judge

[File Endorsement Omitted]

Copies to attorneys of record 3-25-65

[fol. 7]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

[File Endorsement Omitted]

No. 26439

(18 U. S. C., § 2421)

UNITED STATES OF AMERICA

v.

JOE ROBERT COLLIER

VERDICT—March 24, 1965

We, the Jury, find the defendant, JOE ROBERT COLLIER, Guilty as to the one count of the indictment.

March 24, 1965.

/s/ Arnold F. Pohl
(Foreman)

[fol. 8]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. 26,439

UNITED STATES OF AMERICA

v.

JOE ROBERT COLLIER

JUDGMENT AND COMMITMENT—March 24, 1965

On this 24th day of March, 1965 came the attorney for the government and the defendant appeared in person and by counsel, William Goldberg.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty by a jury of the offense of knowingly transporting and causing to be transported a woman in interstate commerce for the purpose of debauchery, prostitution and other immoral purposes, in violation of 18 USC 2421, as charged in the one count of the indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court..

IT IS ADJUDGED that the defendant is guilty as charged and convicted. Pre-sentence report was furnished by the Probation Office and read by the Court.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a perior of One Year and One Day on the one count

IT IS ADJUDGED that the defendant is given *Five Months* to serve and the balance of the sentence is suspended and the defendant placed on probation in regard thereto for a period of Three Years.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and committment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

The Court recommends commitment to:

/s/ Henry L. Brooks
United States District Judge

[File Endorsement Omitted]

[fol. 9]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
Criminal Division

[File Endorsement Omitted]

* * * *

MOTION FOR SUBSTITUTION OF COUNSEL—Filed
April 2, 1965

Comes the defendant, Joe R. Collier, and moves the court to:

1. Strike the name of Honorable William Goldberg in the above styled action, and
2. That the name of Honorable Guy C. Shearer, Suite 903 Republic Building, Louisville, Kentucky be substituted in lieu of the name of William Goldberg.

/s/ Joe R. Collier

[Certificate of Service (Omitted in Printing)]

ORDER

The foregoing motion having been duly filed, the parties having been notified of the motion and the court having been sufficiently advises, it is hereby ordered, that the said motion be, and the same is hereby sustained.

_____
Judge

[fol. 10]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

Criminal Division

[File Endorsement Omitted]

[Title Omitted]

MOTION FOR BOND—Filed April 2, 1965

Comes the defendant in person and by counsel and moves the court to fix a reasonable bail bond for the defendant pending a final determination, an appeal, or final adjudication in this action.

/s/ Joe R. Collier
defendant

/s/ Guy C. Shearer
GUY C. SHEARER
Attorney for Defendant
Republic Building
Suite 903
Louisville, Kentucky
Phone 583-0524

[Certificate of Service (Omitted in Printing)]

[fol. 11]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

Criminal Division

[File Endorsement Omitted]

[Title Omitted]

MOTION FOR A NEW TRIAL—Filed April 2, 1965

Comes the defendant, Joe R. Collier, and moves the court to grant him a new trial in the above styled action for the following reasons:

1. The Court erred in denying defendant's motion for acquittal made at the conclusion of the evidence.
2. The verdict is contrary to the weight of the evidence.
3. The verdict is not supported by substantial evidence.
4. The court erred in admitting testimony of the witnesses to which defendant's counsel objected.
5. The defendant was substantially prejudiced and deprived of a fair trial by reason of the following circumstances; the jury returned from the jury room and asked the court if the jury might be permitted to hear more evidence in the case as revealed by the transcript of the record. The Court as the time stated that the jury was intelligent and should be able to make a determination of the facts in the case and also there was no positive proof that the defendant transported any woman in to Kentucky for immoral purposes nor did any woman so testify. When the jury returned to the court room asking for more evidence the court called attention to the fact that the defendant was driving an expensive car, which comment was highly irregular and prejudicial to the defendant in that it implied that defendant must have gotten the car through some illegal enterprise which no doubt was connected with the offense being heard against the defendant; in other words the court's statement could easily have led the jury into believing that it could guess

[fol. 12] this defendant to be guilty and further guess him in the federal prison.

/s/ Joe R. Collier
Defendant

/s/ Guy C. Shearer
Attorney for Defendant
Suite 903 Republic Building
Louisville, Kentucky 40202
Phone 583-0524

[Certificate of Service (Omitted in Printing)]

[fol. 13]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

[Title Omitted]

ORDER SUSTAINING MOTION TO SUBSTITUTE COUNSEL AND DENYING MOTION FOR NEW TRIAL—April 5, 1965

Motion for a substitution of counsel having been filed, said motion is sustained.

Motion for a new trial having been filed on behalf of Joe R. Collier and having been considered by the Court,

IT IS ORDERED that said motion is denied.

/s/ Henry L. Brooks
United States District Judge

Dated 4/5/65

Copies to:

MR. JOE R. COLLIER
Jefferson County Jail
514 West Liberty Street
Louisville, Kentucky

BOYCE F. MARTIN, JR., Esquire
United States Attorney
Louisville, Kentucky

MR. GUY C. SHEARER
903 Republic Building
Louisville, Kentucky

Copies to above
4-5-65
/s/ C. Sims

[File Endorsement Omitted]

[fol. 14]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

Criminal Division

[File Endorsement Omitted]

[Title Omitted]

MOTION IN ARREST OF JUDGMENT—Filing April 9, 1965

Comes the defendant, Joe R. Collier, and moves the court to arrest the judgement for the following reasons:

1. The indictment does not state facts sufficient to constitute a offense against the United States.
2. The testimony and evidence presented was not sufficient to constitute an offense against the United States.
3. The court is without jurisdiction of the offense, in that the offense if any was not committed in this district.

/s/ Joe R. Collier
Defendant

/s/ Guy C. Shearer
GUY C. SHEARER
Attorney for Defendant
Suite 903 Republic Building
Louisville, Kentucky 40202
Phone 583-0524

[Certificate of Service (Omitted in Printing)]

[fol. 15]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
DIVISION

[File Endorsement Omitted]

Case #26439

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JOE R. COLLIER, DEFENDANT
514 W. Liberty Street
Louisville, Kentucky

GUY C. SHEARER
Appellants Attorney
Suite 903 Republic Bldg.
Louisville, Kentucky
40202

NOTICE OF APPEAL—Filed April 12, 1965

Concise statement of judgment or order, giving date and sentence—

The offense: Violation of 18 U.S.C. #2421—knowingly transporting and causing to be transported a woman in interstate commerce for the purpose of debauchery, prostitution and other immoral purposes, in violation of 18 U.S.C.—2421.

Jury Verdict: "We, the jury, find the defendant Joe Robert Collier, guilty as to the one count of the indictment. March 24, 1965. Arnold F. Pohl, Foreman.

Trial Order dated 3/24/65. Jury verdict guilty as charged in single count. Judgment and commitment dated 3/24/65 (Judge H. Brooks) one years and one day imprisonment: Serve 5 months balance suspended: Probation 3 years W. Supervision—18:3651

Judgment: It is adjudged that the defendant is given five months to serve and that balance of the sentence is suspended and the defendant placed on probation in regard thereto for a period of three years. March 24, 1965. Name of institution where now confined, Jefferson County Jail, 514 West Liberty Street, Louisville, Kentucky, 40202.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Sixth Circuit from the above-stated judgment.

Date—April 10th, 1965.

/s/ Joe R. Collier
Appellant

/s/ Guy C. Shearer
Attorney for Appellant
Suite 903 Republic Bldg.
Louisville, Kentucky 40202
583-0524

On April 12, 1965, copy mailed to U.S. Attorney. On same date copy mailed to Clerk U.S. Court of Appeals 6th Circuit.

/s/ Martin R. Glenn
Clerk

[fol. 16]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
CRIMINAL DIVISION

[File Endorsement Omitted]

[Title Omitted]

MOTION REQUESTING THAT SERVICE OF SENTENCE BE WITHHELD PENDING APPEAL AND FOR RELEASE ON BOND—
Filed April 12, 1965

Comes the defendant, Joe R. Collier, and moves the court for an order directing that any further service of time on judgment heretofore rendered against him be withheld pending final adjudication of the appeal in this action.

The defendant further moves the court to grant him a reasonable bond pending the appeal in this case.

/s/ Joe R. Collier
Defendant

/s/ Guy C. Shearer
GUY C. SHEARER
Attorney for Defendant
Suite 903 Republic Bldg.
Louisville, Kentucky 40202
583-0524

[Certificate of Service (Omitted in Printing)]

[fol. 17]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CRIMINAL ACTION

No. 26439

UNITED STATES OF AMERICA, PLAINTIFF

v.

JOE R. COLLIER, DEFENDANT

ORDER DENYING MOTION IN ARREST OF JUDGMENT AND MOTION FOR BAIL—April 15, 1965

On March 24, 1965, the defendant, Joe R. Collier, was convicted by a jury of violation of the White Slave Act, Title 18 U.S.C. Section 2421, and a sentence of one year and one day was imposed, with the defendant to serve five (5) months and being placed on probation for the balance of the sentence. A motion for a new trial was filed on April 2, 1965, and a motion in arrest of judgment was filed on April 9, 1965. A notice of appeal with a motion for bail pending appeal was filed on April 12, 1965.

As provided by Rule 37 (2) Federal Rules of Criminal Procedure, an appeal must be taken within ten (10) days of entry of judgment of conviction, unless a motion for new trial or a motion in arrest of judgment has been made within the ten (10) day period, in which event the appeal may be taken within ten (10) days after the denial of such motion.

[fol. 18] In this case, neither the motion for a new trial was timely, see Rule 33 Federal Rules of Criminal Procedure, nor was the motion in arrest of judgment timely, see Rule 34 Federal Rules of Criminal Procedure. The filing of a motion for a new trial and motion in arrest of judgment within the time prescribed by the Rules is mandatory and jurisdictional. United States v. DeRocco

320 F.2d 58 (6th Circuit 1963); United States v. Robinson 361 U.S. 220; Bryant v. United States, 261 F.2d 229 (1958 6th Circuit). The time in which an appeal must be taken is also jurisdictional. Lott v. United States, 367 U.S. 421.

The motion for a new trial having heretofore been denied,

IT IS NOW ORDERED that the motion to arrest judgment is dismissed, and the motion for bail pending appeal is denied.

April 15, 1965

/s/ Henry L. Brooks
United States District Judge

For the Plaintiff:

BOYCE F. MARTIN, JR., Esquire
United States Attorney
Louisville, Kentucky

For the Defendant:

GUY C. SHEARER, Esquire
903 Republic Building
Louisville, Kentucky

Copies to above
4/15/65
/s/ C. Sims

[File Endorsement Omitted]

[fol. 19]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

[File Endorsement Omitted]

[Title Omitted]

NOTICE OF APPEAL FROM THE COURT'S ORDER OF APRIL 15, 1965—Filed April 20, 1965

* * * *

Concise statement of judgment or order, giving date and sentence—

The offense: Violation of 18 U.S.C. #2421—knowing transporting and causing to be transported a woman in interstate commerce for the purpose of debauchery, prostitution and other immoral purposes, in violation of 18 U.S.C. #2421.

Attorney—Guy C. Shearer—903 Republic Bldg—Louisville, Ky.

Jury Verdict: "We, the jury, find the defendant, Joe Robert Collier, guilty as to the one count of the indictment, March 24, 1965. Arnold F. Pohl, Foreman.

Trial Order: dated 3/24/65. Jury verdict guilty as charged in single count. Judgment and commitment dated 3/24/65 (Judge H. Brooks) six years and one day imprisonment, serve 5 months balance suspended; Probation 3 years, W. Supervision—18:2651.

Judgment: It is adjudged that the defendant is given five months to serve and that balance of the sentence is suspended and the defendant placed on probation in regard thereto for a period of three years. March 24, 1965. Name of institution where now confined, Jefferson County Jail, 514 West Liberty Street, Louisville, Kentucky, 40202.

Appeal—To U.S. District Court of Appeal for the Sixth District. Federal Building, Cincinnati, Ohio.

[fol. 20] *Order:* On March 24, 1965, the defendant, Joe R. Collier, was convicted by a jury of violation of the White Slave Act, Title 18 U.S.C. Section 2421, and a sentence of one year and one day was imposed, with the defendant to serve five (5) months and being placed on probation for the balance of the sentence. A motion for a new trial was filed on April 2, 1965, and a motion in arrest of judgment was filed on April 9, 1965. A notice of appeal with a motion for bail pending appeal was filed on April 12, 1965.

As provided by Rule 37 (2) Federal Rules of Criminal Procedure, an appeal must be taken within ten (10) days of entry of judgment on conviction, unless a motion for a new trial or a motion in arrest of judgment has been made within the ten (10) day period, in which event the appeal may be taken within ten (10) days after the denial of such motion.

In this case, neither the motion for a new trial was timely, see Rule 33 Federal Rules of Criminal Procedure, nor was the motion in arrest of judgment timely, See Rule 34 Federal Rules of Criminal Procedure. The filing of a motion for a new trial and motion in arrest of judgment within the time prescribed by the Rules is mandatory and jurisdictional. United States v. Dr Rocco 320 F.2nd 58 (6th Circuit 1963) : United States v. Robinson 361 U.S. 220; Bryant v. United States, 261 F.2nd 229 (1958 6th Circuit). The time in which an appeal must be taken is also jurisdictional. Lott v. United States, 367 U.S. 421.

The motion for a new trial having heretofore been denied,

IT IS NOW ORDERED that the motion to arrest judgment is dismissed, and the motion for bail pending appeal is denied.

April 15, 1965.

/s/ Joe Collier
Defendant

/s/ Guy C. Shearer
GUY C. SHEARER
Attorney for Defendant
Suite 903 Republic Bldg.
Louisville, Kentucky 40202
Phone 583-0524

[fol. 21]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

[File Endorsement Omitted]

[Title Omitted]

MOTION TO SUSPEND SENTENCE, ETC.,—Filed May 5, 1965

Comes the defendant, Joe Robert Collier, and moves the Court:

1. To suspend the remainder of the five (5) months sentence heretofore imposed upon him in the above styled action.

2. The defendant, Joe Robert Collier, further moves the Court that in the event the Court is unwilling to suspend the aforementioned five (5) months sentence, then the defendant hereby moves the Court to give him credit on the said sentence for the time he has been confined in the Jefferson County Jail.

_____
Defendant

/s/ Guy C. Shearer
GUY C. SHEARER
Attorney for Defendant
Suite 903 Republic Bldg.
Louisville, Kentucky 40202
Phone 583-0524

[Certificate of Service (Omitted in Printing)]

[fol. 22]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

[Title Omitted]

ORDER TO MODIFY SENTENCE, ETC.,—May 11, 1965

The motion having been made in this case to modify sentence, and the Court having considered it, said motion is denied.

Defendant's motion to give credit for the time he has been in custody awaiting trial was considered when the sentence was imposed and, therefore, that motion is also denied.

May 11, 1965

/s/ Henry L. Brooks
HENRY L. BROOKS
United States District Judge

For the Plaintiff:

BOYCE F. MARTIN, JR., Esquire
United States Attorney
Federal Building
Louisville, Kentucky

For the Defendant:

GUY C. SHEARER, Esquire
903 Republic Building
Louisville, Kentucky

[File Endorsement Omitted]

[fol. 23]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

[File Endorsement Omitted]

[Title Omitted]

MOTION TO EXTEND TIME TO FILE RECORD AND DOCKET APPEAL—Filed May 15, 1965

Comes the defendant, Joe R. Collier, and moves the Court that the time for the filing of the record of appeal and docketing the appeal in the United States District Court of Appeals for the Sixth Circuit in this case be extended to and including June 14th, 1965.

/s/ Guy C. Shearer
Attorney for Defendant
Suite 903 Republic Building
Louisville, Kentucky
Phone 583-0524

[Certificate of Service (Omitted in Printing)]

[fol. 24]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

[File Endorsement Omitted]

[Title Omitted]

ORDER EXTENDING TIME TO FILE RECORD AND TO DOCKET APPEAL—May 17, 1965

Upon motion of defendant by counsel, it is ordered that the time for the filing of the record of appeal and docketing the appeal in this case in the United States District Court of Appeals for the Sixth Circuit in Cincinnati, Ohio be, and the same is hereby extended to and including June 14th, 1965.

/s/ Henry L. Brooks
HENRY L. BROOKS
Judge
5/17/65

Copies mailed 5/17/65 to

GUY C. SHEARER, atty;
BOYCE MARTIN, U.S. Attorney;
CARL W. REUSS, Clk U.S. Ct of Appeals 6th Circuit

/s/ Martin R. Glenn
Clerk

[fol. 24A]

REQUESTS FOR SUBPOENAS AND SUBPOENAS ISSUED

(Omitted in Printing)

[fol. 24B]

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

[Title Omitted]

CLERK'S CERTIFICATE

I, Martin R. Glenn, Clerk of the United States District Court for the Western District of Kentucky, certify that the papers and things submitted herewith and enumerated below comprise the record on appeal in the above matter as same appears in my office:

1. Copy of docket entries.
2. Indictment. Filed February 15, 1965.
3. Order of Court dated March 15, 1965, on arraignment reciting defendant entered plea of not guilty and setting trial for March 24, 1965.
4. (a) Trial Order of the Court dated March 24, 1965, with Jury Verdict referred to at (b) below attached thereto.
   (b) Jury Verdict dated March 24, 1965, reading as follows: "We, the Jury, find the defendant, Joe Robert Collier, Guilty as to the one count of the indictment. March 24, 1965. /s/ Arnold F. Pohl, Foreman". Filed March 24, 1965.
5. Judgment and Commitment of the Court dated March 24, 1965.
6. Motion of defendant to substitute Guy C. Shearer as counsel in lieu of William Goldberg. Filed April 2, 1965.
7. Defendant's "Motion For Bond". Filed April 2, 1965.
8. Defendant's "Motion For A New Trial". Filed April 2, 1965.
9. Order of Court dated April 5, 1965, denying motion for new trial.
10. Defendant's "Motion In Arrest of Judgment". Filed April 9, 1965.

11. Defendant's "Notice of Appeal".
Filed April 12, 1965.
12. Defendant's "Application For Bond Pending Appeal". Filed April 12, 1965.
13. Order of Court dated April 15, 1965, dismissing motion to arrest judgment and denying motion for bail pending appeal.

[fol. 24C] 14. Defendant's "Notice Of Appeal From The Court's Order of April 15, 1965".
Filed April 20, 1965.
15. Motion of Joe Robert Collier to suspend remainder of sentence or to give him credit for time confined in jail. Filed May 5, 1965.
16. Order to Court dated May 11, 1965, denying motion referred to at Item 15 above.
17. Defendant's motion for extension of time in which to file record on appeal and docket appeal in U. S. Court of Appeals. Filed May 15, 1965.
18. Order of Court dated May 17, 1965, extending to and including June 14, 1965, time for filing record on appeal and docketing appeal in U. S. Court of Appeals for 6th Circuit.

* * * *

A. Requests for subpoenas and subpoenas issued.

WITNESS my signature and the seal of the United States District Court for the Western District of Kentucky on the 8th day of June, 1965.

/s/ Martin R. Glenn
MARTIN R. GLENN
Clerk, U. S. District Court
Western District of Kentucky

[SEAL]

[fol. 25] ORIGINAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
CINCINNATI, OHIO

[File Endorsement Omitted]

16599

Re: Cr. No. 26,439

JOE ROBERT COLLIER, PETITIONER-DEFENDANT

vs.

UNITED STATES OF AMERICA, RESPONDENT-PLAINTIFF

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE—Filed May 21, 1965

JOE ROBERT COLLIER
Petitioner—PRO SE
514 W. Liberty Street
Jefferson County Jail
Louisville, Kentucky 40202

[fol. 26]

PETITION FOR MANDAMUS

Comes now, Joe Robert Collier, who hereinafter will be called Petitioner. It is submitted that, on March 24, 1965, in the United States District Court, Western District of Kentucky, at Louisville, Petitioner was found guilty by a jury and sentenced to 1 year and a day in prison for the alleged violation of Title 18, U.S.C. Section 2421. It was adjudged that petitioner serve 5 months in prison, balance of said sentence suspended and, three (3) years on probation. However, petitioner has elected not to serve said sentence pending the outcome of his Appeal of said conviction.

Nine (9) days after petitioner's conviction, (April 2, 1965) a motion for a new trial was properly submitted

in the District Court. On April 5, 1965, said "Motion for a new trial" was denied. A Notice of Appeal from said conviction was filed April 12, 1965. Also, on April 12, 1965, an "Application for Bond pending appeal" was likewise tendered. And, on April 15, 1965, said application for Bond pending Appeal was denied on grounds that, "neither the motion for a new trial was timely", rule 33 F.R. Cr. Proc., which in effect caused the Application for Bond pending Appeal to be not timely filed. (See Court's Orders Attached herewith).

[fol. 27] Petitioner now contends that, rule 37, F.R. Cr. Proc. states as follows:

> "An appeal must be taken within ten (10) days of entry of judgment of conviction, *unless* a motion for new trial or a motion in arrest of judgment has been made within the ten (10) day period, in which event the appeal may be taken within ten (10) days after the denial of such motion."

Wherefore, exhibit one (1) attached herewith explicitly shows that petitioner did comply with the mandate of rule 37 F.R. Cr. Proc. in all respects. See also, Mickey Cohen v. United States, U.S. S.Ct. (1963).

CONCLUSION

Wherefore, the manifestation of the District Court's orders (exhibits 2 and 3 attached herewith) is wholly and clearly erroneous upon its face, which constitutes an abuse of discretion. Rule 37, F.R. Cr. Proc. It is therefore prayed that this honorable Court will issue a Mandamus or some other appropriate order directing the District Court to fully comply with Rule 37, F.R. Cr. Proc. and set an Appeal Bond, Cohen supra, which is not too excessive, U.S.C.A. Amend. 8, Yates v. United States, 356 U.S. 363, (1958), Bordy v. U. S., 81 S.Ct. 197, (1960), This Court's rule, (Rule 30), Brown v. U. S., 359 U.S. 41-52, (1959).

Respectfully submitted,

JOE ROBERT COLLIER
Petitioner-PRO SE

[fol. 28]

EXHIBIT 1 TO PETITION

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
WESTERN DISTRICT OF KENTUCKY
Louisville, Ky.

40202

May 12, 1965

Mr. Joe R. Collier
Jefferson County Jail
514 West Liberty Street
Louisville, Kentucky

United States of America vs.
Joe Robert Collier
Criminal Action No. 26,439

Dear Sir:

On May 10, 1965, there was received your letter dated May 6, 1965, stating that you desire a copy of the indictment in the above case and also copies of all papers filed on your behalf by Mr. Guy C. Shearer, attorney, after your conviction, with information as to the results thereof.

Enclosed herewith is a copy of the indictment filed February 15, 1965.

Also enclosed are copies of all papers that have been filed in this office by Mr. Guy C. Shearer, attorney, on your behalf, consisting of the following:

"Motion For Substitution of Counsel" filed April 2, 1965.
"Motion For Bond" filed April 2, 1965.
"Motion For A New Trial" filed April 2, 1965.
"Motion In Arrest of Judgment" filed April 9, 1965.
"Notice Of Appeal" filed April 12, 1965.
"Application For Bond Pending Appeal" filed April 12, 1965.
"Notice Of Appeal From The Court's Order Of April 15, 1965". Filed April 20, 1965.
"Motion", filed May 5, 1965.

Also enclosed are copies of orders of this Court dated April 5, 1965, April 15, 1965, and May 11, 1965.

Yours sincerely,

/s/ Martin R. Glenn
MARTIN R. GLENN
Clerk, U. S. District Court

cc: Mr. Guy C. Shearer
903 Republic Building
Louisville, Kentucky

[fol. 29]

[CLERK'S NOTE: Exhibit 2 is omitted from the record here. See p. 13, *supra*]

[fols. 30-31]

[CLERK'S NOTE: Exhibit 3 is omitted from the record here. See p. 18, *supra.*]

[fol. 32]

[PROOF OF SERVICE (Omitted in Printing)]

[fol. 33]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[File Endorsement Omitted]

[Title Omitted]

RESPONSE AND MOTION—filed May 29, 1965

On May 21, 1965, the defendant-petitioner filed in this Court a "Petition for a Writ of Mandamus to the United States District Court for the Western District of Kentucky at Louisville." This is in response to said petition.

The order entered by the District Court Judge, dated April 15, 1965, clearly sets out the reasons why defendant-petitioner did not file a timely notice of appeal, and is, therefore, not entitled to bail pending appeal. The defendant-petitioner was convicted by a jury of a violation of the White Slave Traffic Act, 18 U.S.C., section 2421, on March 24, 1965. He was given a sentence of one year and one day, five months to be served and the balance of the sentence to be probated. Defendant-petitioner filed a motion for a new trial on April 2, 1965. He filed a motion in arrest of judgment on April 9, 1965. A notice of appeal and a motion for bail pending appeal was filed on April 12, 1965.

[fol. 34] The motion for a new trial, which was filed on April 2, 1965, was not timely in that it was filed more than five days after the verdict. Rule 33, Federal Rules of Criminal Procedure, provides that a motion for a new trial "*shall* be made within five days after verdict or finding of guilty, or within such further time as the Court may fix during the five-day period." No further time was fixed by the Court.

The motion in arrest of judgment, which was filed on April 9, 1965, was not timely filed. Rule 34, Federal Rules of Criminal Procedure, provides that a motion in arrest of judgment "*shall* be made within five days after determination of guilt or within such further time as the Court may fix during the five-day period." No such further time was fixed by the Court.

The notice of appeal with a motion for bail pending appeal, which was filed on April 12, 1965, was not timely filed. Rule 37(2), Federal Rules of Criminal Procedure, provides that "an appeal by a defendant may be taken within ten days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment had been made within the ten-day period an appeal from a judgment of conviction may be taken within ten days after entry of the order denying the motion." Although a motion for a new trial and a motion in arrest of judgment had been filed within ten days from the judgment of conviction, they were not timely filed as required by Rules 33 and 34, Federal Rules of Criminal Procedure, and therefore they were not effective and did not toll the time required for filing a [fol. 35] notice of appeal. Therefore, the notice of appeal having been filed some 19 days after the judgment of conviction, it was not timely, and therefore it necessarily follows that defendant-petitioner is not entitled to bail.

WHEREFORE, it is prayed that for the foregoing facts and reasons the defendant-petitioner's petition for a writ of mandamus be denied, and that the appeal herein be dismissed.

UNITED STATES OF AMERICA
BOYCE F. MARTIN, JR.
United States Attorney

By /s/ John E. Stout
JOHN E. STOUT
Assistant U. S. Attorney

[CERTIFICATE OF SERVICE (Omitted in Printing)]

[fol. 36] No. 16,599

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[File Endorsement Omitted]

JOE ROBERT COLLIER, DEFENDANT-PETITIONER

v.

UNITED STATES OF AMERICA, PLAINTIFF-RESPONDENT

ORDER DENYING PETITION FOR WRIT OF MANDAMUS AND DISMISSING APPEAL.—Filed June 16, 1965

Before CECIL, O'SULLIVAN and PHILLIPS, Circuit Judges.

Petitioner has filed a petition for writ of mandamus against the Judge of the United States District Court for the Western District of Kentucky at Louisville, which in effect is an application for bail pending appeal. Respondent has moved that the appeal be dismissed because the notice of appeal was not filed until some nineteen days after the judgment of conviction.

The order of the district court, entered April 15, 1965, summarizes the pertinent facts as follows:

[fol. 37] "On March 24, 1965, the defendant, Joe R. Collier, was convicted by a jury of violation of the White Slave Act, Title 18, U.S.C. Section 2421, and a sentence of one year and one day was imposed, with the defendant to serve five (5) months and being placed on probation for the balance of the sentence. A motion for a new trial was filed on April 2, 1965, and a motion in arrest of judgment was filed on April 9, 1965. A notice of appeal with a motion for bail pending appeal was filed on April 12, 1965.

"As provided by Rule 37 (2) Federal Rules of Criminal Procedure, an appeal must be taken within ten (10) days of entry of judgment of conviction, unless a motion for new trial or a motion in arrest of judgment has been made within the ten (10) day

period, in which event the appeal may be taken within ten (10) days after the denial of such motion.

"In this case, neither the motion for a new trial was timely, see Rule 33 Federal Rules of Criminal Procedure, nor was the motion in arrest of judgment timely, see Rule 34 Federal Rules of Criminal Procedure. The filing of a motion for a new trial and motion in arrest of judgment within the time prescribed by the Rules is mandatory and jurisdictional."

Under the holdings of this court and Rules 33, 34 and 37(2) of the Federal Rules of Criminal Procedure, the appeal was not timely. *United States* v. *DeRocco*, 320 F.2d 58 (C.A. 6).

[fol. 38] It is ORDERED that the petition for writ of mandamus be and hereby is overruled, the motion to dismiss the appeal is sustained and the appeal is dismissed.

ENTERED BY ORDER OF THE COURT

/s/ Carl W. Reuss
Clerk

[fol. 39]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 40]

SUPREME COURT OF THE UNITED STATES

No. 331 Misc., October Term, 1965

JOE ROBERT COLLIER, PETITIONER

v.

UNITED STATES

ORDER DENYING PETITION FOR WRIT OF MANDAMUS, TREATING PAPERS SUBMITTED AS A PETITION FOR WRIT OF CERTIORARI AND GRANTING PETITION FOR WRIT OF CERTIORARI—October 25, 1965

ON CONSIDERATION of the motion for leave to file a petition for writ of mandamus herein,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, denied.

Treating the papers submitted as a petition for writ of certiorari, the motion for leave to proceed in forma pauperis and the petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted. The case is transferred to the appellate docket as No. 695 and placed on the summary calendar.

October 25, 1965

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 695

Petition Not Printed
Response Not Printed
Reply Not Printed

JOE ROBERT COLLIER,

Petitioner,

—v.—

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER JOE ROBERT COLLIER

DEAN E. DENLINGER
Attorney
3d Floor Talbott Tower
Dayton, Ohio

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Federal Rules of Criminal Procedure, Preliminary Draft, with Notes and Forms, Prepared by the Advisory Committee on Rules of Criminal Procedure, United States Government Printing Office 1943, Appeal Rule 35(a)(2), p. 152 7

8 *Moore's Federal Practice* ¶37.02 (2d ed., 1965 revision) 8

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 695

JOE ROBERT COLLIER,

Petitioner,

—v.—

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER JOE ROBERT COLLIER

Opinion Below

The opinions and orders of the courts below (R. 7-8, 13, 18-19, 23, 25, 34-35) are unreported.

Jurisdiction

The judgment of the court of appeals was entered June 16, 1965 (R. 34). Petitioner, without the assistance of counsel, filed a typewritten petition for a writ of mandamus in this Court on June 24, 1965 (R. 28-29). The Court treated the petition as a petition for a writ of certiorari, and granted certiorari, with leave to proceed in forma pauperis, on October 25, 1965 (R. 36). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

Rules Involved

The relevant provisions of the Federal Rules of Criminal Procedure (18 U.S.C. Appendix) are set forth in the Appendix, *infra*.

Question Presented

Whether the time within which to take an appeal under Rule 37(a)(2) of the Federal Rules of Criminal Procedure is enlarged by a motion for a new trial which is filed within the 10-day period prescribed by Rule 37(a)(2) but which is not timely under Rule 33.

Statement

On March 24, 1965, petitioner was convicted by a jury of a violation of the White Slave Act (18 U.S.C. Sec. 2421) in the United States District Court for the Western District of Kentucky (R. 7, 4). On that same day, March 24, judgment of conviction was entered, and petitioner was sentenced to imprisonment and committed to the custody of the Attorney General (R. 7-8). Nine days thereafter, on April 2, 1965, petitioner filed a motion for a new trial, predicated upon grounds other than newly discovered evidence (R. 11-12). The motion was denied by the District Court on April 5, 1965 (R. 13).[1] Seven days thereafter, on April 12, 1965, petitioner filed a notice of appeal (R. 15-16).[2]

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[1] On April 2, 1965 petitioner also filed a motion for substitution of counsel which was sustained by the District Court on April 5, 1965 (R. 9, 13).

[2] On April 9, 1965, petitioner filed a motion in arrest of judgment, and, on April 12, 1965, petitioner filed a motion requesting that service of sentence be withheld pending appeal and for release on

On June 16, 1965, the court below dismissed the appeal as untimely (R. 34-35). The court below based its conclusion upon the ground that the motion for a new trial was not timely under Rule 33 of the Federal Rules of Criminal Procedure, and that the motion in arrest of judgment was not timely under Rule 34 (R. 35).

Summary of Argument

Under the plain and express terms of Rule 37(a)(2) the appeal was timely filed. Rule 37(a)(2) provides that an appeal may be taken within 10 days of judgment, unless within that 10-day period a motion for a new trial has been filed, in which case the appeal may be taken within 10 days of the denial of the motion. Rule 37(a)(2) does not require such a motion to be timely under Rule 33 in order to start a new 10-day period running. Rule 37(a)(2) should be read simply, in a straightforward way. This promotes simplicity and fairness, as required by Rule 2. This also permits motions for new trial to be filed, where a question of timeliness exists under Rule 33, without undue and unnecessary peril to the defendant's right to appeal. Furthermore, Rule 37(a)(2) should be construed so as to permit direct appeals in preference to collateral attack, a sound policy which has been endorsed by this Court. Conversely, the administration of Rule 33 is in no way harmed, or even affected by a straightforward application of the Rule. The decision of the court below creates an unwarranted com-

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bond (R. 14, 17). On April 15, 1965, these motions were denied by the District Court (R. 18-19). Petitioner also filed, on May 5, 1965, a motion to suspend sentence, or, in the alternative, to credit petitioner for time during which he was confined in Jefferson County Jail (R. 22). This motion was denied by the District Court on May 11, 1965 (R. 23).

plication not contained in the Rule, unduly restricts direct appeals, and creates an injustice to those relying on the explicit terms of the Rule.

ARGUMENT

1. The Plain Meaning of Rule 37(a)(2), Its Background, and Sound Policy Compel the Conclusion That the Appeal Was Timely Filed.

Rule 37(a)(2) provides in relevant part that:

> An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion.

In construing this language, "We look first to the face of the statute" (*Jarecki* v. *G. D. Searle & Co.*, 367 U.S. 303, 307 (1961)), for the "[m]ost relevant [legislative material], of course, is the very language in which [the legislator] has expressed its policy and from which the Court must extract the meaning most appropriate" (*Carpenters Local 1976* v. *Labor Board*, 357 U.S. 93, 100 (1958)). The language of the Rule is clear and unambiguous. It provides that an appeal may be taken within 10 days of entry of judgment, but that if within that 10-day period a motion for a new trial (or in arrest of judgment) is made, then in such event the appeal may be taken within 10 days following the denial of such motion. The Rule contains no qualifications, restrictions, provisos, or otherwise limiting language. It does not incorporate any of its sister rules, including Rule 33 and its separate time limits, by reference

or inference or implication, direct or otherwise. As stated by the Court of Appeals for the Tenth Circuit in *Lujan* v. *United States,* 204 F. 2d 171, 172 (10th Cir. 1953), Rule 37(a)(2) "fails to contain any language indicating even by clear implication that it is limited to a motion seasonably filed under Rule 33". The appeal in the instant case conformed explicitly to the express requirements of Rule 37(a)(2). Thus, the motion for a new trial was made "within 10 days after entry of the judgment" and the appeal was taken "within 10 days after entry of the order denying the motion". There is nothing in Rule 37(a)(2) which requires or suggests that the motion for a new trial to which it refers must meet the separate and additional time requirements of Rule 33 in order to start the running of a new 10-day period. And, the language of Rule 37(a)(2) being plain and unambiguous, and conveying a clear and definite meaning, there is no occasion to strain for an ambiguity which does not appear. Had the framers of the Rules sought to impose additional restrictions or qualifications upon the time limits of Rule 37(a)(2) it could easily have utilized appropriate language to accomplish such a result. It did not do so.

Buttressing the precise, unambiguous language of Rule 37(a)(2), and the direct interpretation stated above, is the clear mandate expressed in Rule 2. It is there provided that "These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." It is thus stated that primary attention in the interpretation of the Rules shall be directed toward "simplicity" and "fairness". As this Court stated in *United*

States v. *Debrow*, 346 U.S. 374, 376 (1953), "The Federal Rules of Criminal Procedure were designed to eliminate technicalities in criminal pleading and are to be construed to secure simplicity in procedure." Rule 2 was inserted "to make sure that the Rules would be construed in the liberal spirit contemplated by their framers." *United States* v. *Young*, 14 F.R.D. 406 (D.C. D.C. 1953) (Holtzoff, J.), rev'd on grounds not relevant here, 214 F. 2d 232 (D.C. Cir. 1954). To strain for ambiguities which do not appear in Rule 37(a)(2), to add a complicating technicality as does the interpretation of the court below, accomplishes neither "simplicity" nor "fairness".

Our analysis of Rule 37(a)(2) is further confirmed by its legislative evolution. The predecessor of Rule 37(a)(2) was Rule III of the Criminal Appeals Rules of 1933. Under Rule II(2) of those Rules, motions for new trials were required to be made within three days after a verdict or finding of guilt. Rule III required that an appeal be taken within five days after entry of judgment "except that where a motion for a new trial has been made *within the time specified* in subdivision (2) of Rule II, the appeal must be taken within five (5) days after entry of the order denying the motion." (Emphasis added.) Thus, the predecessor to Rule 37(a)(2), unlike the present Rule 37(a)(2), specifically provided that the motion for a new trial must have been timely under the separate rule regarding such motions in order to start the running of a new five-day period for the taking of an appeal. The omission of any such restrictive provision in the present Rule 37(a)(2) is of itself compelling evidence of the intention to avoid and eliminate any such qualification.

In addition, and even more significantly, the preliminary draft of the present Rule 37(a)(2) specifically contained a similar qualification. The initially proposed rule read in relevant part as follows:

> (2) Time for Taking Appeal. An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial *has been made seasonably,* an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion . . . "[3]

Thus, the proposed rule would have provided, and if adopted would only then have supported the view of the court below, that a new 10-day period in which an appeal might be taken would run only if a motion for a new trial had been made "seasonably". The rejection of this restriction was presumably deliberate, particularly in the light of its concomitant deletion of the "within the time specified in subdivision (2) of Rule II" restriction contained in the predecessor Rule III, *supra.*

Neither the language of the Rules nor their background in any way suggests an interpretation of Rule 37(a)(2) which would restrict the right of appeal beyond those restrictions already contained therein. On the contrary, where the Rule does not foreclose it (which is certainly the case here), the Rule should be construed so as to permit direct

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[3] Federal Rules of Criminal Procedure, Preliminary Draft, with Notes and Forms, Prepared by the Advisory Committee on Rules of Criminal Procedure, United States Government Printing Office 1943, Appeal Rule 35(a)(2), p. 152. "While these notes are not authoritative, they are somewhat analogous to a Congressional Committee Report in determining the intentions of the framers of the Rules." *United States* v. *Mihalopoulous,* 228 F. Supp. 994, 1002 (D.C. D.C. 1964) (Holtzoff, *J.*).

appeals rather than to leave the defendant to the chances of collateral proceedings to obtain review of a judgment. "It is more appropriate, whenever possible, to correct errors reachable by the appeal rather than remit the parties to a new collateral proceeding." *Bartone* v. *United States,* 375 U.S. 52, 54 (1963). This construction comports with the purpose stated in Rule 2 that the Rules are designed to promote simplicity of procedure and to eliminate expense and delay. Consistent with that purpose, it also avoids the restrictive scope of review which obtains in collateral proceedings. Indeed, the "statistical probability of error alone suggests that a defendant's right of appeal should be jealously preserved." 8 *Moore's Federal Practice* 37-4, ¶37.02 (2d ed., 1965 revision). "Foreclosing direct appeal in some cases, moreover, has undoubtedly increased collateral attacks on convictions, a result which burdens the district courts as well as the courts of appeals." 8 *Moore's Federal Practice* 37-7, ¶37.02 (2d ed., 1965 revision). Both this Court and the courts of appeal have applied this approach in a variety of situations so as not to restrict unnecessarily the right of appeal. See e.g. *Bartone* v. *United States, supra; Corey* v. *United States,* 375 U.S. 169 (1963); *Fallen* v. *United States,* 378 U.S. 139 (1964); *Calland* v. *United States,* 323 F. 2d 405 (7 Cir. 1963); and *Boruff* v. *United States,* 310 F. 2d 918 (5 Cir. 1962).

2. No Valid Reason Exists to Restrict Rule 37(a)(2) by Implication.

As stated above, a direct, understandable and unencumbered interpretation of Rule 37(a)(2) is compelled not only by the clear and unambiguous language of the Rule itself, but also by its history and purpose. To so read the Rule

yields neither absurd nor meaningless consequences, nor does it in any way interfere with the effective administration of the procedural rules. Were there a countervailing policy of substantial import to be balanced against the plain meaning of Rule 37(a)(2), the situation might be otherwise. But no such balancing problem is involved. The court below is troubled by the apparent anomaly that motions for a new trial under Rule 33 are to be made within 5 days of verdict.[4] The grounds apparently relied upon by the court below and its sister courts reaching the same conclusion do not warrant the limitation of Rule 37(a)(2).

First, it is said that "a paper, even though denominated a motion for a new trial, which is not filed within the time specified in Rule 33" (*United States* v. *Bertone*, 249 F. 2d 156, 158; see also *United States* v. *DeRocco*, 320 F. 2d 58, 60) is not actually a motion for a new trial and cannot therefore serve to enlarge the time for appeal under Rule 37(a)(2). The short answer to this semantic approach[5] is that the "paper" is obviously a motion for a new trial,

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[4] The court followed its decision in *United States* v. *DeRocco*, 320 F. 2d 58 (1963). The Courts of Appeals for the Third and Fifth Circuits have reached the same conclusion as the court below. *United States* v. *Bertone*, 249 F. 2d 156 (3d Cir. 1957); *Lott* v. *United States*, 280 F. 2d 24 (5th Cir. 1960), *rev'd. on other grounds*, 367 U.S. 421 (1961). So also has the Court of Appeals for the Ninth Circuit in dicta; *Marion* v. *United States*, 171 F. 2d 185 (9th Cir. 1949), *Pugh* v. *United States*, 197 F. 2d 509 (9th Cir. 1952), and apparently the Court of Appeals for the Eighth Circuit in an unclear ruling, *Godwin* v. *United States*, 185 F. 2d 411 (8th Cir. 1950). The Court of Appeals for the Tenth Circuit has reached a contrary conclusion, *Lujan* v. *United States*, 204 F. 2d 171 (10th Cir. 1953), *Smith* v. *United States*, 273 F. 2d 462 (10th Cir. 1959). This Court withheld decision on the point in *Lott, supra*.

[5] This subtlety of reasoning is surely a "technicality" which the Rules "were designed to eliminate" (*Debrow* v. *United States, supra*).

but it is simply one which is untimely under Rule 33. Secondly, it is said that Rule 37(a)(2) must be read in light of Rule 33 to avoid the elimination of the 5-day time limit contained in Rule 33. See e.g. *Bertone, supra,* 249 F. 2d at 158-159.[6] To read Rule 37(a)(2) so as to permit enlargement of the time for an appeal, in the event of both timely and untimely motions for a new trial made within the 10-day period, in no way undermines the time limits contained in Rule 33. Rather, when a motion for a new trial is untimely under Rule 33, the result is simply that the trial court is unable to grant the motion, regardless of the effect of that motion upon the separate time limits of Rule 37(a)(2) for taking an appeal.

The restrictive interpretation of Rule 37(a)(2), urged by the Government in the court below (R. 32-33), fails to take into account the mandate of Rule 2 and the policy favoring direct appeals. In fact, the cases supporting the Government's position do not discuss either of these considerations. Instead, the policy said to be served is that of harmonizing Rules 33 and 37. Harmonizing the Rules in question has but theoretical desirability; it should not serve to defeat the weightier consideration favoring a less restrictive reading of Rule 37. If it is believed that there is an anomaly between the time periods of Rules 33 and 37 (a)(2) which must be resolved in the interest of theoretical

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[6] The reasoning of *Bertone* on this point is legalistic. (1) "Rule 37(a)(2) reads in terms of the denial of the motions for a new trial to which it refers." (2) "Denial presupposes consideration of the merits." (3) "[M]otions for a new trial which are untimely filed may not be considered on their merits . . . ." Therefore (4) "if the defendant is right any motion for a new trial which is filed within 10 days after entry of judgment is timely and must be considered . . . on its merits." *Bertone,* 249 F. 2d at 158-159. Cf. *Lott* v. *United States,* 367 U.S. 421, 425 (1961), describing this reasoning as "the legalisms of the Government's . . . argument."

consistency, then the proper procedure to accomplish this result is by amendment of the Rules. Indeed, as the Government's memorandum in opposition to certiorari in the instant case points out (pp. 2-3):

> The Committee on Rules of Practice and Procedure of the Judicial Conference, in proposing Uniform Rules of Federal Appellate Procedure, has made it clear that only timely motions for a new trial or in arrest of judgment will extend the time for filing a notice of appeal. (See Preliminary Draft, March 1964, Rule 4(d); pp. 7, 8).

At any rate, as we have said, we see no meaningful conflict between Rules 33 and 37(a)(2). To permit an otherwise untimely motion to enlarge the time for taking an appeal does no harm to the administration of Rule 33, and, at the same time, affirmatively serves to promote the interests of simplicity, fairness, and availability of direct appeals. There is thus no reason to deviate, as did the court below, from the plain language of Rule 37(a)(2).

3. Granting Additional Time to Appeal in the Case of an Untimely Motion for a New Trial Meets a Practical Procedural Need.

It may be felt that granting additional appeal time in the event of an untimely new trial motion is a pointless artificiality. To the contrary, this provision serves a valid purpose.

Computation of time limits under Rules 33 and 34 is not without difficulties. It is first necessary to determine the date of the "verdict or finding of guilty" (in the case of

Rule 33) or of the "determination of guilt" (in the case of Rule 34). Even upon mature reflection (the time for which is not always available to the trial lawyer), these dates have proved troublesome to ascertain. *Lott* v. *United States*, 367 U.S. 421; *Godwin* v. *United States*, 185 F. 2d 411, 413 (erroneous belief of trial judge); *Pugh* v. *United States*, 197 F. 2d 509, 511-512 (time computation of trial judge, held to be erroneous). In addition, under Rule 45(a) intermediate Sundays and holidays are excluded in computing the 5-day period, but are not excluded in computing the 10-day period.

Thus an appellant may well feel that his motion is in time under Rules 33 or 34, when in fact it is not. If he proceeds to file such a motion within 10 days of judgment of conviction no serious delay is encountered. In all fairness, he should then have the additional 10-day period following denial of the motion in which to appeal, whether or not the motion was in fact timely under Rule 33. Otherwise, the lawyer must proceed at his peril, even when within the 10-day period, where a question exists as to the timeliness of the motion. Surely these few days are a small concession to the interest of fairness, where the entire right of appeal is at stake.[7]

At the same time, there is scarcely any temptation to file a motion for a new trial or in arrest of judgment which is intentionally late under Rules 33 or 34 in order to obtain more time in which to appeal. It is simpler by far to file a notice of appeal than to file a motion under Rules 33 or 34. Cases of late filing of motions under Rules 33 or 34 will

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[7] A timely new trial motion grants the trial court an opportunity to correct its own errors at once and is not to be discouraged by needless perils.

almost inevitably be mistakes of lawyers, not devices to defer the necessity of filing a notice of appeal.

These practical considerations may or may not have occurred to the draftsmen of Rule 37(a)(2). In any event they are reasonable, and promote the objectives expressed in Rule 2, especially that of fairness. When taken with the considerations discussed earlier, any need to restrict that Rule by implication completely disappears.

Conclusion

It is respectfully submitted that the order of the Court below should be reversed and the case remanded for consideration of the appeal on its merits.

DEAN E. DENLINGER
Attorney for Petitioner

January, 1966

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APPENDIX

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APPENDIX

The relevant provisions of the Federal Rules of Criminal Procedure (18 U.S.C., Appendix) are as follows:

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 2. Purpose and Construction.

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

Rule 33. New Trial.

The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

Rule 37. Taking Appeal; and Petition for Writ of Certiorari.

(a) *Taking Appeal to a Court of Appeals.*

* * * * *

(2) Time for Taking Appeal. An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment

of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.

CRIMINAL APPEALS RULES OF 1933[8]

II. *Motions.* * * *

(2) Save as provided in subdivision (3) of this Rule, motions in arrest of judgment, or for a new trial, shall be made within three (3) days after verdict or finding of guilt. * * *

III. *Appeals.* An appeal shall be taken within five (5) days after entry of judgment of conviction, except that where a motion for a new trial has been made within the time specified in subdivision (2) of Rule II, the appeal may be taken within five (5) days after entry of the order denying the motion. * * *

[8] These Rules are set forth at 292 U.S. 661.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 695

JOE ROBERT COLLIER, PETITIONER

v.

UNITED STATES OF AMERICA

MOTION TO VACATE THE ORDER OF THE COURT OF APPEALS AND TO REMAND THE CAUSE FOR FURTHER CONSIDERATION

On March 24, 1965, a jury in the United States District Court for the Western District of Kentucky found petitioner guilty of violating 18 U.S.C. 2421 (R. 7), and the court entered a formal judgment of conviction on the same day (R. 7–8). On April 2, petitioner, through new counsel, filed a motion for a new trial (R. 11–12), which was untimely under Rule 33, Fed. R. Crim. P. This motion, it appears, was coupled with a motion for bail "pending a final determination, an appeal, or final adjudication in this action" (R. 10). The motion for a new trial was denied on April 5 (R. 13), and, on April 12, petitioner filed a notice of appeal from his March 24 conviction and a motion for bail pending appeal (R. 15–16). The district

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court denied the motion for bail on the ground that the April 12 notice of appeal was untimely under Rule 37(a)(2), Fed. R. Crim. P., since it was not filed within ten days after judgment or within ten days of the denial of a timely motion under Rule 33 or 34 (R. 18–19). The court of appeals, treating petitioner's petition for mandamus (R. 28–29) as an application for bail pending appeal, overruled the petition and dismissed the appeal as untimely on the same ground relied upon by the district court (R. 34–35). This Court granted certiorari on October 25, 1965 (R. 36; 382 U.S. 890).

The only question raised by petitioner in this Court and the courts below, and the only issue passed on by the lower courts, was whether petitioner's untimely motion for new trial, made nine days after judgment, enlarged the period for filing a notice of appeal under Rule 37(a)(2). In preparing our brief on the merits in this case, however, we discovered in the record (which was not sent up from the district court until after certiorari had been granted) petitioner's motion of April 2 for bail "pending a final determination, an appeal, or final adjudication in this action" (R. 10). This paper had apparently been overlooked by counsel and the courts below in considering the issue of timeliness. If this document, filed within ten days after judgment, is construed as a notice of appeal, petitioner is entitled to prosecute his appeal in the court below whether or not his untimely motion for a new trial enlarged the time for noticing an appeal.

The courts of appeals have been liberal in accepting as sufficient notices of appeal documents which, though technically defective, manifest an intent to appeal. See, *e.g.*, *Newsom* v. *Peyton*, 341 F. 2d 904 (C.A. 4) (letter); *United States* v. *Duncan*, 310 F. 2d 367 (C.A. 7), certiorari denied, 373 U.S. 938 (same); *Riffle* v. *United States*, 299 F. 2d 802 (C.A. 5) (same); *Poe* v. *Gladden*, 287 F. 2d 249, 251 (C.A. 9) (application for certificate of probable cause). Although most of the cases have involved indigent defendants acting without counsel, a similar approach is reflected in several cases involving deficient "notices" filed by counsel. Particularly relevant here is *O'Neal* v. *United States*, 272 F. 2d 412 (C.A. 5) (appeal bond filed by counsel). See also *Tillman* v. *United States*, 268 F. 2d 422 (C.A. 5) (motion for leave to appeal *in forma pauperis* filed by counsel); *Blunt* v. *United States*, 244 F. 2d 355 (C.A.D.C.) (same); *Sica* v. *United States*, 325 F. 2d 831 (C.A. 9), certiorari denied, 376 U.S. 952 (document filed by counsel failing to state expressly that appeal is being taken).

The precept that documents evincing an intent to appeal should be liberally construed to meet the notice requirement of the Federal Rules would seem applicable here. It cannot be said, however, that the question whether petitioner's "Motion for Bond" is a sufficient notice of appeal—a question not considered by the court below—is so well settled as to be entirely free from doubt. In these circumstances, we believe it

would be appropriate to remand the cause to the court of appeals for expeditious consideration of this issue. Cf. *United States* v. *Malphurs,* 316 U.S. 1; *Bates* v. *United States,* 323 U.S. 15, 17; *Manufacturers' Finance Co.* v. *McKey,* 294 U.S. 442, 453–454. This motion is being filed in order to bring the matter to the Court's attention so that the Court will have an opportunity to pass upon our suggestion in advance of oral argument. If the Court should prefer to hear argument of the cause, we shall file a brief on the merits discussing the issue noted above as well as the issue presented by the petition.

For the reasons stated above, we move this Court to vacate the order entered in this action by the United States Court of Appeals for the Sixth Circuit and to remand the cause to that court for expeditious consideration of the question whether the "Motion for Bond" filed by petitioner on April 2, 1965, constitutes a sufficient notice of appeal.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

FEBRUARY 1966.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 695

JOE ROBERT COLLIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The order of the court of appeals denying a petition for a writ of mandamus and dismissing petitioner's appeal (R. 34–35) is not reported.

JURISDICTION

The order of the court of appeals was entered on June 16, 1965. A motion for leave to file a petition for a writ of mandamus seeking the reinstatement of appeal was filed in this Court on June 24, 1965. On October 25, 1965, the motion was denied, the papers submitted treated as a petition for a writ of certiorari, and the petition granted (R. 36; 382 U.S. 890). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner's motion for bond was a sufficient notice of appeal.[1]

2. If not, whether the court of appeals properly dismissed as untimely an appeal in a criminal case noticed more than 10 days after judgment but less than 10 days after the denial of an untimely motion for a new trial, which had been filed on the 9th day after verdict.

RULES INVOLVED

Rule 37(a)(2) of the Federal Rules of Criminal Procedure provides in pertinent part:

> *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. * * *

Rule 33 of the Federal Rules of Criminal Procedure provides:

> *New Trial.* The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered

[1] This question was not raised by the petition but was noticed by the Solicitor General when the record was forwarded to this Court following the grant of certiorari. Obviously, this is not a case in which the respondent would be prejudiced by the Court's taking notice of an issue not raised in the petition.

> evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

Rule 45(b) of the Federal Rules of Criminal Procedure provides:

> *Enlargement.* When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect; but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal.

STATEMENT

After a trial by jury in the United States District Court for the Western District of Kentucky, petitioner was convicted of transporting a female in interstate commerce for immoral purposes in violation of 18 U.S.C. 2421. He was sentenced to imprisonment for one year and a day, five months of which were to be served and the balance to be suspended on condi-

tion the petitioner be placed on probation for three years.

The jury's verdict was returned on March 24, 1965, in the presence of petitioner and his counsel (R. 6), and a formal judgment was entered on the same day (R. 7–8).

On April 2, 1965, petitioner, through new counsel, filed a motion for a new trial alleging insufficiency of the evidence and errors by the trial court in denying a motion for acquittal, admitting testimony, and commenting to the jury (R. 11–12). At the same time, he filed a motion for bail "pending a final determination, an appeal, or final adjudication in this action" (R. 10). The motion for a new trial was denied on April 5, 1965 (R. 13).[2]

On April 12, 1965, petitioner, through counsel, filed a notice of appeal (R. 15–16). He also moved at this time that service of sentence be withheld and that he be released on bond pending appeal (R. 17). On April 15, 1965, the district court denied bail pending appeal, noting that the appeal was not timely under Rule 37(a)(2) of the Federal Rules of Criminal Procedure since notice thereof had not been filed within 10 days of judgment or within 10 days after the denial of timely motions (pursuant to Rules 33 and 34, Fed. R. Crim. P.) for a new trial or in arrest of judgment (R. 18–19).

On May 21, 1965, petitioner filed a petition for a writ of mandamus in the court of appeals, which in effect was an application for bail pending appeal (R.

[2] On April 9, petitioner filed a motion in arrest of judgment (R. 14) which was denied on April 15 (R. 18–19).

28–29). On June 16, 1965, the court of appeals overruled the petition and dismissed the appeal as untimely (R. 34–35).

SUMMARY OF ARGUMENT

I

Petitioner's motion for bond, filed on the ninth day after judgment, complied with only a few of the prescribed requirements for a notice of appeal and apparently was not intended to serve as such a notice. It did evince petitioner's intention to take an appeal, however, and conveyed information from which the judgment appealed from and the court appealed to could be ascertained. The courts of appeals have been liberal in construing documents such as petitioner's motion as sufficient notices of appeal. Because such documents appear to serve the essential purposes of a notice, and since it seems unwise to consider the drafter's state of mind when determining the sufficiency of a notice, this Court may properly conclude that petitioner's motion for bond was a sufficient notice of appeal.

II

If the Court does not feel that petitioner's motion for bond was an adequate notice of appeal, we submit that the appeal was untimely and was properly dismissed.

1. Under Rule 37(a)(2), an untimely motion for a new trial cannot enlarge the time for filing a notice of appeal. The recently revised version of that Rule, which expressly recognizes this precept, reflects no

change in policy. As the Advisory Committee's note indicates, and as the context, purpose and history of the present Rule show, the revised Rule simply makes clear what was intended in the present version.

2. Rule 37(a)(2), as the majority of courts which have considered the problem have found, cannot be read in isolation from the other Rules. Since Rule 37(a)(2) contemplates that the time to appeal may be tolled only by a motion which may be granted or denied on the merits, it must be read either as referring only to a timely motion or as enlarging the time for filing motions for a new trial and in arrest of judgment. The second reading clearly conflicts with Rules 33 and 34 and is therefore impermissible. Petitioner's suggestion that an untimely motion—which may not be considered on the merits—may extend the period for appeal in effect relegates such a motion to a self-granting request for an extension of the time to appeal. This reading, too, is impermissible, since it is in conflict with Rule 45(b) and could effectively nullify the 10-day limit in Rule 37(a)(2) itself.

3. The reason for allowing a timely motion for new trial to enlarge the period for taking appeal—*i.e.*, that such a motion may affect the district court's decision as well as the appeal—is inapplicable in the case of an untimely motion. Nor does any "practical procedural need" exist for including untimely motions within the compass of Rule 37(a)(2).

4. The history of the Rule confirms the interpretation which its context and purpose compel—that present Rule 37(a)(2), like its predecessor and recently

adopted successor, does not permit the extension of its prescribed time limit by the filing of an untimely motion for new trial.

ARGUMENT

I

IN THE GOVERMENT'S VIEW, THE COURT MIGHT PROPERLY CONCLUDE THAT PETITIONER'S MOTION FOR BOND WAS A SUFFICIENT NOTICE OF APPEAL

The prescribed procedure for appealing a decision of a district court to a court of appeals in a criminal case is the filing of a timely notice of appeal with the clerk of the lower court. Rule 37(a)(1), Fed. R. Crim. P. According to the Rules, "[t]he notice of appeal shall set forth the title of the case, the name and address of the appellant and of the appellant's attorney, a general statement of the offense, a concise statement of the judgment or order, giving its date and any sentence imposed, the place of confinement if the defendant is in custody and a statement that the appellant appeals from the judgment or order."[3] (*Ibid.*) If such a notice is filed within ten days after entry of judgment, the appeal is timely.

On April 2, 1965, the ninth day following entry of judgment, petitioner's counsel filed a motion requesting "the court to fix a reasonable bail bond for the defendant pending a final determination, an

[3] Amended Rule 37(a)(1), promulgated by this Court on February 28, 1966, to take effect on July 1, 1966, requires only that the following be identified: the party taking the appeal, the judgment or order appealed from, and the court to which appeal is taken.

appeal, or final adjudication in this action" (R. 10). Except for the title of the case, the names of petitioner and his attorney and the latter's address, the motion contained none of the information called for in Rule 37(a)(1). Since it was filed together with a motion for a new trial, it seems reasonably clear that the document was not intended to serve as a notice of appeal;[4] and in fact it was apparently not treated as such by petitioner, his counsel or the court. Nevertheless, the motion for bond notified the court and government counsel that petitioner contemplated appealing from his conviction, and supplied sufficient information to identify the judgment from which, and the court to which, appeal was to be taken.

Documents such as this, while not fully complying with the provisions of Rule 37(a)(1), have nonetheless been considered sufficient notices of appeal. See, *e.g., Newsom* v. *Peyton,* 341 F. 2d 904 (C.A. 4) (letter); *United States* v. *Duncan,* 310 F. 2d 367 (C.A. 7), certiorari denied, 373 U.S. 938 (same); *Riffle* v. *United States,* 299 F. 2d 802 (C.A. 5) (same); *Poe* v. *Gladden,* 287 F. 2d 249, 251 (C.A. 9) (application for certificate of probable cause). Although most of the cases have involved indigent defendants acting without counsel, a similar approach is reflected in several cases involving deficient "notices" filed by counsel.[5]

[4] After the filing of a timely notice of appeal, the district court is without power to grant a motion for new trial. See *United States* v. *Smith,* 331 U.S. 469.

[5] See *Tillman* v. *United States,* 268 F. 2d 422 (C.A. 5) (motion for leave to appeal *in forma pauperis* filed by counsel); *Blunt* v. *United States,* 244 F. 2d 355 (C.A.D.C.) (same); *Sica* v. *United States,* 325 F. 2d 837 (C.A. 9), cer-

In *O'Neal* v. *United States*, 272 F. 2d 412 (C.A. 5), the court held that an appeal bond filed by counsel was sufficient as a notice of appeal. Like the motion for bond in this case, the appeal bond in *O'Neal* was not intended by counsel to serve as a notice of appeal; the court itself discovered the bond in the record and, in holding it a sufficient notice of appeal, acted *sua sponte*. Although O'Neal's appeal bond was more verbose than petitioner's motion and expressly stated that the appellant "has sued out an appeal" (272 F. 2d at 413, n. 1), we do not believe there is any substantial difference between the two documents. We suggest, therefore, that *O'Neal* and the other lower court decisions liberally construing notices of appeal are applicable here. The question remains whether these cases were correctly decided.

It may be argued that to allow a substantial deviation from the requirements of the Rules in cases where the parties are represented by counsel would rob Rule 37(a)(1) of most of its effect. But we believe that there is no compelling reason to insist that the form of notice conform precisely to that prescribed in the Rules. Ordinarily, the timely filing of a writing indicating that an appeal from a specified or readily identifiable judgment is contemplated will sufficiently inform the prevailing party that it may not yet safely close its books on the case and that it should be prepared for the possibility that the losing party will perfect an appeal. Such a writing also informs the trial court of the possibility of an appeal

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tiorari denied, 376 U.S. 952 (document filed by counsel failing to state expressly that appeal is being taken).

and is virtually as satisfactory as a more carefully drawn notice for purposes of determining whether the critical time limitations have been complied with. Thus, it would seem that the essential functions of a notice of appeal are served by a document conveying the information contained in petitioner's motion for bond.

It may also be argued that petitioner's motion should not be viewed as a notice of appeal because petitioner never intended it to serve as such, although he did contemplate that he would take an appeal. The determination of the sufficiency of a notice of appeal need not turn, however, upon an appraisal of the drafter's state of mind. Rather, it would seem desirable that the determination be made in objective and fairly mechanical terms, in order to comply with the mandate that the Rules "be construed to secure simplicity in procedure" (Rule 2, Fed. R. Crim. P.). If some notice is conveyed, that probably should be deemed sufficient.

For the foregoing reasons, the Court might properly conclude that petitioner's motion for bond was a sufficient notice of appeal[6] and, on this ground, re-

[6] The treatment of a motion for bond such as petitioner's as a sufficient notice does not mean that a district court would be without jurisdiction to consider a timely motion for new trial where that motion is coupled with a motion for bond pending appeal. In such a case, the court would be free to view the motion for bond (as indeed it could view a more carefully drawn notice of appeal) as contingent upon the disposition of the motion for new trial on its merits. Cf. *Lemke* v. *United States*, 346 U.S. 325. Alternatively, the court could suggest that the motion for bond be recast so as to relate only to the pendency of further action in the trial court, at the con-

verse the decision below dismissing the appeal as untimely.

II

AN UNTIMELY MOTION FOR A NEW TRIAL DOES NOT EXTEND THE TIME FOR APPEAL IN CRIMINAL CASES

Assuming that petitioner's motion for bond was not a sufficient notice of appeal, no notice of appeal was filed until 19 days after final judgment (R. 15–16). Consequently, unless petitioner's motion for a new trial (R. 11–12) tolled the 10-day period for taking an appeal under Rule 37(a)(2) (*supra,* p. 2), his appeal was out of time and was properly dismissed by the court of appeals.[7] See *United States* v. *Robinson,* 361 U.S. 220. The motion for new trial, however, made 9 days after verdict and judgment, was itself untimely under Rule 33 (*supra,* pp. 2–3), which fixes the time for filing a motion for new trial on grounds other than newly discovered evidence at 5 days after verdict or finding of guilt. This untimely motion, we submit, cannot be considered in calculating the time within which an appeal may be taken under Rule 37(a)(2).

1. On February 28, 1966, this Court entered an order, effective July 1, 1966, amending Rule 37(a)(2) to provide, in pertinent part, as follows:

> The notice of appeal by a defendant shall be filed within 10 days after the entry of the judgment or order appealed from. * * * If a

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clusion of which a new notice of appeal could, of course, be filed.

[7] Petitioner does not claim that his untimely motion in arrest of judgment, filed more than 10 days after entry of judgment, extended the time for noticing an appeal.

> *timely* motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of the order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of judgment. [Emphasis supplied.]

These provisions were drafted by the Advisory Committee on Appellate Rules in response to this Court's suggestion in *Lott* v. *United States*, 367 U.S. 421, 425, n. 9,[8] and were submitted to the Judicial Conference's Committee on Rules of Practice and Procedure on March 31, 1964 (34 F.R.D. 263). Some parts of the revised rules, including portions of amended Rule 37(a)(2), were recognized in the Advisory Committee's notes as "new" or as "chang[ing] the present rule" (see 34 F.R.D. 276, 277), but this was not the case with the provisions quoted above. Noting that the "question has arisen" as to whether an untimely motion for new trial extends the time for taking an appeal, the Advisory Committee stated that "[t]he proposed statement *makes it clear* that only a timely motion will have" that effect (34 F.R.D. 277; emphasis supplied). The revised rule embodies no

[8] Recognizing "the obscurity, if not inconsistency," in the various rules bearing on the question involved in this case, the Court in *Lott* found it unnecessary to resolve the issue but stated that it "may and should leave that problem and its kindred ones * * * for resolution by the rule-making process * * *" (367 U.S. at 425).

change of policy. As we shall show, it merely clarifies what, in light of established practice, must have been the intention underlying Rule 37(a)(2) in its present form.

2. Petitioner contends that present Rule 37(a)(2) must be read without regard to any other rule. But every court which has considered the question, with one exception, has agreed that Rule 37(a)(2) must be read in conjunction with Rules 33 and 34. *United States* v. *Bertone*, 249 F. 2d 156 (C.A. 3); *O'Neal* v. *United States*, 264 F. 2d 809, 812 (C.A. 5); *Lott* v. *United States*, 280 F. 2d 25 (C.A. 5), reversed on other grounds, 367 U.S. 421; *United States* v. *DeRocco*, 320 F. 2d 58 (C.A. 6); *Godwin* v. *United States*, 185 F. 2d 411 (C.A. 8); *Marion* v. *United States*, 171 F. 2d 185 (C.A. 9), certiorari denied, 337 U.S. 944; *Pugh* v. *United States*, 197 F. 2d 509 (C.A. 9).[9] Only the Tenth Circuit has taken the view that Rule 37(a)(2) may be read in isolation and that an untimely motion for new trial can enlarge the time for filing an appeal. *Lujan* v. *United States*, 204 F. 2d 171; *Smith* v. *United States*, 273 F. 2d 462. In so doing, however, that court has recognized that its view "creates an anomalous situation" while the majority decisions "tend to harmonize" the Rules (273 F. 2d at 465).[10]

[9] See also *Dickey* v. *United States*, 332 F. 2d 773 (C.A. 9); *Rayor* v. *United States*, 323 F. 2d 519 (C.A. 9), certiorari denied, 375 U.S. 993; *Fallen* v. *United States*, 306 F. 2d 697 (C.A. 5), reversed on other grounds, 378 U.S. 139.

[10] In *Smith*, *supra* at 465, the court declined to overrule *Lujan* partly on the ground that appellate courts should overrule decisions only for the most compelling reasons, particularly where

Such coordination, we submit, is essential under the present rules. In cases where a motion for a new trial or in arrest of judgment extends the time to appeal, Rule 37(a)(2) provides that an appeal "may be taken within 10 days after entry of the order denying the motion." In referring to an order *denying* a motion, the authors of the rule presumably contemplated an order entered after consideration of the motion on its merits. On this assumption, and in view of the fact that the courts lack jurisdiction either to grant or deny untimely motions under Rules 33 or 34, but must dismiss them (*United States* v. *Robinson*, 361 U.S. 220, 224–226; *Marion* v. *United States*, 171 F. 2d 185 (C.A. 9), certiorari denied, 337 U.S. 944), two readings of Rule 37(a)(2) are logically possible. The rule may apply only to motions that are timely under Rule 33 or 34; this is our view and that of most of the courts which have passed on the question. Otherwise, the rule must be read as providing that any motion for new trial or in arrest of judgment is timely, and thus may be granted or denied on the merits, if it is filed within ten days after judgment.

The second reading is clearly impermissible. As the court stated in *United States* v. *Bertone*, 249 F. 2d 156, 159 (C.A. 3):

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the error cannot be corrected without substantial injury to litigants. Significantly, the appellant in *Smith*, convicted as a first offender on narcotics charges, faced a 52-year sentence. In *Lujan*, *supra*, the court was apparently influenced by the fact that, on the day of sentence (7 days after verdict), the trial court entered an order purporting to grant the appellant leave to file within ten days thereafter a motion for a new trial, which appellant filed within the time prescribed in the court's order.

> * * * This [reading] would have the effect of writing out of Rule 33 the specific limitation that a motion for a new trial based on grounds other than newly discovered evidence "shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period." We cannot agree to a construction of Rule 37(a)(2) which would thus eliminate the 5-day limitation of Rule 33 and substitute a period which would always be at least 10 days and could be much longer than that. * * *

The construction adopted by the court below, on the other hand, harmonizes the provisions of Rules 33, 34, and 37(a)(2), giving full effect to each, and "thus carries out what must have been the intent of the Supreme Court in promulgating * * * [these] rules at the same time" (249 F. 2d at 158).

Petitioner unsuccessfully seeks to avoid the need for reading Rule 37(a)(2) in conjunction with other Rules by suggesting that, in referring to an order *denying* a motion for new trial, the rule also contemplates an order *dismissing* such a motion as untimely. Under this view, the rule would permit an enlargement of the time to appeal upon the filing of untimely, as well as timely, motions for new trial. But this reading of Rule 37(a)(2) does even more damage to the Rules as a whole than the construction criticized in Bertone, *supra*.

Petitioner recognizes that an untimely motion for new trial cannot be considered on the merits. In effect, therefore, his suggestion relegates such a motion to the unique status of a self-granting request for an

extension of the time in which to file a notice of appeal. Such a construction is hardly in keeping with the precept that the Rules are to be construed "to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay" (Rule 2, Fed. R. Crim. P.). Moreover, petitioner's interpretation is plainly in conflict with Rule 45(b) (*supra*, p. 3), which prohibits the district court from granting an application to extend the time to appeal. Under petitioner's interpretation, a defendant who could not obtain an extension of the time to appeal through a request to the court may nevertheless—without making any request—automatically obtain at least a 10-day extension simply by filing an untimely "motion for a new trial" within ten days after judgment. Thus, notwithstanding the clear intent of the rules to fix the time for appealing at ten days[11]—unless there is pending in the district court some motion which could affect the outcome of the case—petitioner's rule would permit any defendant to wait at least twenty days before filing an appeal.[12]

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[11] See *United States* v. *Robinson*, 361 U.S. 220; *Berman* v. *United States*, 378 U.S. 530.

[12] Petitioner asserts that "there is scarcely any temptation to file a motion for a new trial or in arrest of judgment which is intentionally late under Rules 33 or 34 in order to obtain more time in which to appeal" (Pet. Br. 12). Even if this is so, it is no reason to adopt a rule which would permit a doubling of the maximum time expressly provided for in Rule 37(a)(2). Moreover, the primary purpose for establishing a short period for filing criminal appeals was to avoid the great delays occasioned by the 3-month period in existence before the advent of the Criminal Appeal Rules. See Orfield, *Federal Criminal Appeals*, 45 Yale L.J. 1223, 1231 (1936); Note, *Federal Criminal*

3. There are ample reasons for allowing a timely motion for a new trial on grounds other than newly discovered evidence[13] to extend the time for appealing. Such a motion may affect the judgment of the district court, thus making an appeal unnecessary or inadvisable, and consideration of the district court's decision denying such a motion may often properly form a part of the case on appeal. Moreover, the interest in finality of judgments ordinarily does not come into play while a timely motion for new trial is pending in the district court. None of these reasons apply in the case of an untimely motion. Accordingly, the authors of the recent clarifying amendment to Rule 37(a)(2) (see pp. 11–12, *supra*) expressly limited its operation to timely motions under Rules 33 and 34.

Contrary to petitioner, no "practical procedural need" compels adoption of his interpretation of Rule 37(a)(2)—which he candidly recognizes may be felt to create "a pointless artificiality" (Pet. Br. 11). The issues cognizable on a motion in arrest of judgment—challenges to the jurisdiction of the court or the sufficiency of the indictment—are apparent long before verdict. Trial errors forming the basis for a motion for a new trial are likewise evident by the time of verdict, at least to the extent necessary for deciding whether to seek an extension of time within which to file such a motion. The practical impor-

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Appeals Under the 1934 Rules, 52 Harv. L. Rev. 983 (1939); Note, *Timely Appeals and Federal Criminal Procedure*, 49 Va. L. Rev. 971, 972 & nn. 6 & 7 (1963).

[13] A motion for new trial based on newly discovered evidence may be filed before or within two years after final judgment. Rule 33, Fed. R. Crim. P.

tance of giving early attention to these matters, moreover, was clearly pointed out by this Court in *United States* v. *Smith*, 331 U.S. 469, 476, as follows:

> * * * [A]s time passes, the peculiar ability which the trial judge has to pass on the fairness of the trial is dissipated as the incidents and nuances of the trial leave his mind to give way to immediate business. It is in the interest of justice that a decision on the propriety of a trial be reached as soon after it has ended as is possible, and that decision be not deferred until the trial's story has taken on the uncertainty and dimness of things long past.

The only "practical procedural need" pointed to by petitioner for acceptance of his interpretation arises from his assertion that "[c]omputation of time limits under Rules 33 and 34 is not without difficulties" (Pet. Br. 11). But computation of the 5-day period under these Rules is no more difficult than computation of the 10-day period under Rule 37(a)(2) or, for that matter, of the 20-day period which could result from petitioner's interpretation.[14] Difficulties of computation might support the argument that the trial court should be empowered to extend the time for filing an appeal upon a showing

[14] It is important to note that the 5-day period for making a motion for new trial begins at the time of *verdict or finding of guilt*, while the 10-day period for filing an appeal does not begin until *judgment*. Particularly in the frequent case in which the court calls for a pre-sentence report, the time for taking appeal may not start until long after the time for moving for a new trial has elapsed. In such circumstances, it seems most unlikely that the untimely filing of a motion for new trial within ten days after judgment could be attributed to difficulties of computation.

of excusable neglect, and revised Rule 37(a)(2) has a provision to this effect.[15] As this Court held in *Robinson,* however, the present rule clearly does not permit such an extension. Even if it did, it would avail petitioner nothing. He made no application to the trial court for relief on the basis of excusable neglect, and there is nothing in the record to suggest that the untimeliness of petitioner's notice was due to excusable neglect.[16]

4. The history of Rule 37(a)(2) confirms the interpretation which its context and purposes compel—*i.e.,* that only a timely motion for a new trial can extend the time for filing a notice of appeal.

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[15] The Advisory Committee's note incorporates the comparable note with respect to civil cases, which observes in part (34 F.R.D. 276): "In view of the ease with which an appeal may be perfected—the filing of a simple notice with the clerk of the district court—no reason other than failure to learn of the entry of judgment should ordinarily excuse a party from the requirement that the notice be timely filed. But the district court should have authority to permit the notice to be filed out of time in extraordinary cases where injustice would otherwise result."

[16] No special circumstances are alleged, and none appears in the record, which call for relaxation of the rule that the time to appeal fixed by Rule 37(a)(2) is jurisdictional and cannot be enlarged. Petitioner was neither ill nor without counsel at the critical time for appealing, as was the defendant in *Fallen* v. *United States*, 378 U.S. 139. There is no suggestion of fraud, deceit, or inadequate representation by counsel. See *Peoples* v. *United States*, 337 F. 2d 91, 93 (C.A. 10), certiorari denied, 381 U.S. 916. Petitioner and his counsel clearly had notice of the date of judgment. Cf. *Rosenbloom* v. *United States*, 355 U.S. 80. Moreover, counsel was put on notice by the 1963 decision in *United States* v. *DeRocco*, 320 F. 2d 58, that the law in the Sixth Circuit followed established precedent in requiring that a motion for a new trial be timely filed in order to toll the time for filing an appeal.

The predecessor of Rule 37(a)(2) was Rule III of the Criminal Appeals Rules, promulgated on May 7, 1934 (292 U.S. 659, 662–663). It provided that "[a]n appeal shall be taken within five (5) days after entry of judgment of conviction, except that where a motion for a new trial has been made within the time specified in subdivision (2) of Rule II,[17] the appeal may be taken within five (5) days after entry of the order denying the motion." Under this rule, it was well settled that an untimely motion for a new trial did not extend the time for taking an appeal. *Decker* v. *United States,* 97 F. 2d 473 (C.A. 5); *O'Gwin* v. *United States,* 90 F. 2d 494 (C.A. 9); *Fewox* v. *United States,* 77 F. 2d 699 (C.A. 5).

The present rule was promulgated on February 8, 1946 (see 327 U.S. 825, 857–858), after nearly twelve years of practice under Criminal Appeals Rule III. Although there were some necessary changes in language in the new rule,[18] the Advisory Committee's note indicates that the only change in substance relevant here was the enlargement of the time for taking appeal from 5 to 10 days.

Petitioner attempts to find support for his inter-

[17] That rule fixed the time for filing a motion for new trial at 3 days after verdict or finding of guilt. Rule II(3) fixed the time for filing motions for new trial based on newly discovered evidence at 60 days after final judgment. 292 U.S. at 662. A motion for a new trial on the ground of newly discovered evidence did not extend the period for taking appeal. See *Fewox* v. *United States,* 77 F. 2d 699 (C.A. 5).

[18] Thus, no shorthand reference could be made in the new rule to Rule 33, similar to the reference in the old rule to Rule II(2), since Rule 33 dealt with all motions for new trial, including those based on newly discovered evidence.

pretation of Rule 37(a)(2) in the fact that the first preliminary draft of that Rule (then numbered 35 (a)(2)) provided that "if a motion for a new trial has been made seasonably, an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion." This phraseology was obviously unsatisfactory since it would have permitted the time for appeal to be extended by a seasonable motion for new trial based on newly discovered evidence, which, under that draft, could be made "at any time before or after final judgment" (Preliminary Draft, Rule 31(c)). Accordingly, petitioner may not read into the rejection of this proposed formulation an intent to change years of practice by allowing an unseasonable motion to extend the time to appeal.

Petitioner fails to point out that the Second Preliminary Draft of the Rules replaces the phrase, "if a motion for a new trial has been made seasonably," with "if a motion for a new trial *is then pending*" (Second Preliminary Draft, Rule 39(a)(2); emphasis supplied). This version avoids inclusion of motions based on newly discovered evidence made more than 10 days after judgment. The reference to a "pending" motion, moreover, strongly suggests that only a motion which could be considered on the merits—*i.e.*, a timely motion—was contemplated. The language of the second revision was unsatisfactory, however, because it may have left some doubt as to what was meant by the word "then". To erase any doubt, the present Rule substituted for "is then pending" the phrase, "has been made within the 10-day pe-

riod." It seems clear that, notwithstanding these changes in language, no change in meaning was intended. The present Rule 37(a)(2)—like its predecessor and its recently adopted successor—does not permit the extension of its prescribed time limit by the filing of an untimely motion for new trial.

CONCLUSION

If this Court finds that petitioner's motion for bond constituted a sufficient notice of appeal, the cause should be remanded to the court of appeals for disposition on the merits. If it concludes otherwise, we respectfully submit that the order of the court below should be affirmed.

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SUPREME COURT OF THE UNITED STATES

No. 695.—October Term, 1965.

Joe Robert Collier, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[April 19, 1966.]

Per Curiam.

On March 24, 1965, a jury in a federal district court found petitioner guilty of violating the Mann Act, 18 U. S. C. § 2421 (1964 ed.), and a formal judgment was entered against him on the same day. Nine days later, on April 2, 1965, a new trial motion was filed by petitioner's counsel alleging various errors at trial. Since Fed. Rules Crim. Proc. 33 expressly requires that a new trial motion not based on newly discovered evidence be filed within five days of the verdict, petitioner's motion was untimely and the District Court denied it on April 5, 1965. On April 12, 1965, seven days after the denial of the motion and 19 days after the judgment, petitioner through counsel filed a notice of appeal from his conviction. The Court of Appeals for the Sixth Circuit dismissed the appeal as untimely, a ruling in accord with the views of several other circuits but in conflict with those of the Tenth Circuit. Compare, *e. g.*, *United States* v. *Bertone*, 249 F. 2d 156 (C. A. 3d Cir.), with *Smith* v. *United States*, 273 F. 2d 462 (C. A. 10th Cir.). Treating petitioner's petition for mandamus as one for a writ of certiorari, we granted certiorari, 382 U. S. 890, to consider the timeliness question, left open in *Lott* v. *United States*, 367 U. S. 421, 425. We reverse the Court of Appeals and remand the case to allow petitioner's appeal to be heard.

Federal Rules of Criminal Procedure 37 (a)(2), entitled "Time for Taking Appeal," provides in relevant part that "[a]n appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion." Plainly petitioner's appeal was timely if this Rule is literally read since the appeal was filed within 10 days after denial of a new trial motion itself filed within 10 days of the judgment of conviction. To the contrary, the Government argues that a new trial motion, not based on newly discovered evidence, filed more than five days after the verdict and so destined to be rejected as untimely under Rule 33 should not serve to give defendant an extension of time to appeal since there is no possibility the appeal will be avoided by a grant of the motion. Further support is found by the Government in a number of Court of Appeals' decisions adopting this view, in the history of Rule 37 (a)(2), and in a very recent amendment to that Rule which plainly adopts the Government's basic approach for the future.*

We believe competing interests outweigh the Government's arguments. The literal language of Rule 37 (a)(2) sustains petitioner and even a perceptive read-

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*The amendment, approved by the Court on February 28, 1966, and absent disapproval by Congress effective on July 1, 1966, pertinently provides: "If a *timely* motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of the order denying the motion." (Emphasis added.) Thus the effect of the amendment is to embrace prospectively the Government's view of the interrelationship between Rules 33 and 37 (a)(2). A contemporaneous amendment to Rule 33 would extend the time for filing a new trial motion from five to seven days.

ing of Rules 33 and 37 (a)(2) together would not dispel all doubt. A criminal appeal is at stake and under Fed. Rules Crim. Proc. 45 (b) the period for taking it may not be extended, while the rare and relatively brief delay in appeal allowed by petitioner's construction causes very little injury to the Government. In these circumstances a reading that departs from the literal terms of Rule 37 (a)(2) by constricting the opportunity to appeal seems to us inappropriate. Because of our disposition we need not consider a suggestion by the Government, apparently not made to or passed on by the Court of Appeals in this case but first tentatively raised after the grant of certiorari and only later pressed upon us in oral argument, that on the present facts a motion for bail bond filed by petitioner nine days after his conviction may do unintended service as a notice of appeal.

Reversed and remanded.

MR. JUSTICE BLACK concurs in the Court's judgment for the reasons stated in the opinion of the Court of Appeals for the Fifth Circuit in *O'Neal* v. *United States*, 272 F. 2d 412.

END